(2)

No. 04-468

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AG INDUSTRIAL MANUFACTURING INC.
and CLAUDE E. BROWN,

Petitioners,

v.

WATERKEEPERS NORTHERN CALIFORNIA,
a non-profit corporation dba DELTAKEEPER,
and BILL JENNINGS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an industrial manufacturer that admits it never made any effort to comply with the Clean Water Act ("CWA") prior to being served with a 60-day notice of intent to sue under CWA section 505, 33 U.S.C. § 1365(b), can defeat subject matter jurisdiction by asserting that it has partially complied with the CWA prior to the commencement of a citizen enforcement action against it.

2. Whether a 60-day notice letter which (a) alleges that an industrial manufacturer has been in daily violation of the CWA due to its conceded failure to prepare and implement specifically identified plans and reports; (b) lists more than 300 specific dates on which the manufacturer allegedly discharged contaminated stormwater in violation of the CWA, and (c) details the specific provisions of the CWA permit that the manufacturer allegedly violated satisfies the CWA's notice requirement, as implemented by 40 C.F.R. § 135.3(a), to provide "sufficient information to permit the recipient to identify the specific standard, limitation or order alleged to have been violated . . . [and] the date or dates of such violation."

RULE 29.6 CORPORATE DISCLOSURE NOTATION

Respondent WaterKeepers Northern California, d/b/a DeltaKeeper, has no parent corporation and there are no companies that hold any stock in Respondent, which is a non-profit corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE NOTATION	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	viii
OPINIONS BELOW	1
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
I. AIM Effectively Concedes that, as of the Filing of the Complaint, It Had Not Come Into Full Compliance With the Act.	3
II. Following a Thorough Investigation, WaterKeepers Sent AIM a Detailed Notice Letter Describing AIM's Alleged Violations.	4
III. In Dismissing WaterKeepers' Complaint for Lack of Subject Matter Jurisdiction, the District Court Expressly Declined to Consider Any of WaterKeepers' Evidence that AIM was in Continuous Violation of the Act.	5

Contents

	Page
REASONS FOR DENYING THE PETITION	7
I. This Court Should Deny Review Because It Already Rejected AIM's Main Contentions in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*	8
II. The Ninth Circuit Properly Recognized That a Defendant Could Deprive the Court of the Power to Hear a Case by Coming into Complete Compliance During the 60-Day Notice Period.	11
III. There Is No Conflict Among the Circuit Courts, and the Ninth Circuit Correctly Applied the CWA's Notice Requirements in This Case.	13
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

American Canoe Association Inc. v. District of Columbia Water and Sewer Authority, 306 F. Supp. 2d 30 (D.D.C. 2004) 17

Atlantic States Legal Foundation Inc. v. Stroh Die Casting Co., 116 F.3d 814 (7th Cir. 1997) 14

Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 14

City of New York v. Anglebrook Ltd Partnership, 891 F. Supp. 900 (1995) 17

Friends of Frederick Seig Grove # 94 v. Sonoma County Water Agency, 124 F. Supp. 2d 1161 (N.D. Cal. 2000) 8

Friends of the Earth v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) 11

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 40 (1987) ..... *passim*

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) 13

Cited Authorities

Page

Mullan v. Torrance,
22 U.S. 537 (1824) 12-13

NRDC v. Southwest Marine, Inc.,
236 F.3d 985 (9th Cir. 2000), *cert. denied*,
533 U.S. 902 (2001) 7, 11, 15, 17

NRDC v. Southwest Marine, Inc.,
945 F. Supp. 1330 (S.D. Cal. 1996), *aff'd*,
236 F.3d 995 (9th Cir. 2000) 8, 16

ONRC Action v. Columbia Plywood, Inc.,
286 F.3d 1137 (9th Cir. 2002) 7

San Francisco BayKeeper v. Tosco Corp.,
309 F.3d 1153 (9th Cir. 2002) 14

Sierra Club v. Union Oil Co. of California,
813 F.2d 1480 (9th Cir.) 4

Steel Co. v. Citizens for a Better Environment,
528 U.S. 83 (1998) 11

FEDERAL STATUTES

33 U.S.C. § 1251 1

33 U.S.C. § 1365(b) ..... i, 14

Cited Authorities

Page

RULES

Federal Rule of Civil Procedure Rule 11 10

Federal Rule of Civil Procedure Rule 12(b) 5

United States Supreme Court Rule 10 7

FEDERAL REGULATIONS

40 C.F.R. § 131.38 4

40 C.F.R. § 135.3(a) ..... i, 14, 16

55 Fed. Reg. 47990 (Nov. 16, 1990) 15

TABLE OF APPENDICES

Page

Appendix A — Memorandum And Order Of The United States District Court For The Eastern District Of California Dated And Filed March 13, 2003 ..... 1a

Appendix B — Notice Of Violations And Intent To File Suit Dated June 28, 2000 ..... 8a

Respondents WaterKeepers Northern California, dba DeltaKeeper, and Bill Jennings ("WaterKeepers") respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's judgment in this case.

OPINIONS BELOW

In addition to the two opinions set forth in the petition for certiorari, the district court also issued an unpublished memorandum and order denying petitioners' motion for attorneys' fees, attached hereto as Appendix A ("App.").

PRELIMINARY STATEMENT

This case does not present any reason, let alone a "compelling reason," for the Court to grant discretionary review. The case law on the issues presented is well-settled, and petitioners concede that there is no inter-circuit conflict. Pet. 20. Indeed, petitioners' first question presented simply rehashes an issue that was definitively resolved by this Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) ("*Gwaltney*"), which held that a defendant's partial compliance with the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA" or "Act"), does not deprive the federal courts of subject matter jurisdiction. Rather, this Court held, such jurisdiction attaches so long as plaintiffs have made "a good-faith allegation of continuous or intermittent violations" that are ongoing when the complaint is filed. *Gwaltney*, 484 U.S. at 64.

WaterKeepers not only made precisely such allegations here, but also presented on summary judgment extensive proof that these violations continued long after the filing of

the complaint. The district court nevertheless refrained from considering this evidence, or the evidence submitted in opposition by petitioners AG Industrial Manufacturing, Inc. and Clause E. Brown (collectively, "AIM"). Accordingly, the required response under *Gwaltney* is to remand the case for resolution of these factual disputes, which is precisely what the Ninth Circuit did here.

AIM's second question presented is too convoluted to parse with any certainty, but appears to be primarily directed at whether WaterKeepers' notice letter satisfies the CWA's straightforward notice requirements. Applying the same "strict construction" standard as its sister circuits, the Ninth Circuit properly upheld WaterKeepers' notice letter, which provides more detailed information about AIM's alleged violations than any other CWA notice discussed in any published decision. Moreover, AIM's arguments are founded on a host of disputed, and in many cases spurious, factual assertions. Because neither court below reached these disputes, there is no reason why this Court should do so in the first instance.

STATEMENT OF THE CASE

WaterKeepers presents the following Statement of the Case to supplement and correct the mischaracterizations in AIM's statement.

I. AIM Effectively Concedes that, as of the Filing of the Complaint, It Had Not Come Into Full Compliance With the Act.

AIM expressly acknowledges that it operated the subject industrial manufacturing facility ("Facility") for more than two decades without taking any steps to comply with the CWA or the "General Permit" issued by the State of California to cover operations such as the Facility. Pet. 5. AIM also implicitly concedes that, by the filing of the complaint, it had at best only come into partial compliance with the Act. Indeed, rather than claiming outright that it had eliminated all of its alleged violations, the strongest assertion AIM can muster is that, by the time of the complaint, it "had *initiated* compliance efforts." Pet. 20 (emphasis added).

In any event, AIM's own pollution prevention plans and self-monitoring reports document that its "initial efforts" did not succeed in eliminating all violations alleged by WaterKeepers. For instance, shortly before the expiration of the 60-day notice period, AIM prepared its first Storm Water Pollution Prevention Plan ("SWPPP"), in purported compliance with the General Permit. In September 2001, more than a year after WaterKeepers filed the instant action, AIM prepared a substantially revised SWPPP, which purported to correct numerous legal inadequacies WaterKeepers had identified in AIM's initial SWPPP. *See, e.g.*, WaterKeepers' Supplemental Excerpts of Record in Case No. 03-15631 ("SER") at 15-18.

AIM's revised SWPPP identifies the following as materials at the Facility that may contribute pollutants to storm water run-off: acids, batteries, paints, anti-freeze, solvents and dissolved metal sources, the latter including such

heavy metals as lead, zinc, copper, iron, nickel cadmium, antimony, and chromium. Critically, AIM's limited post-complaint monitoring and sampling of its discharges—conducted in response to WaterKeepers' notice—reveal that the Facility discharged aluminum, copper, iron, lead, and zinc in excess of both the "California Toxics Rule," 40 C.F.R. § 131.38, and the "benchmark values" established by the U.S. Environmental Protection Agency ("EPA") for use in evaluating CWA compliance. As AIM acknowledged, its own reports also "recorded visual observations of cloudy discharges with a sheen on three out of five occasions in 2001." SER 15; *see also* SER 13, 20-21.

The merits of this case are, of course, not before the Court. Nevertheless, in light of AIM's unsupportable assertions regarding WaterKeepers' asserted lack of good faith in bringing suit, WaterKeepers must note that the violations recorded in AIM's self-monitoring reports—standing alone—constitute *conclusive* proof of CWA violations.[1]

II. Following a Thorough Investigation, WaterKeepers Sent AIM a Detailed Notice Letter Describing AIM's Alleged Violations.

Commencing in 1999, WaterKeepers' staff, expert consultant, and attorneys conducted a thorough pre-notice investigation of the Facility to determine whether AIM was

1. *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1490-91 (9th Cir. 1987), *vacated for reconsideration*, 485 U.S. 931, *reinstated and amended*, 853 F.2d 667 (9th Cir. 1988); *see also Gwaltney*, 484 U.S. at 53 (noting that Gwaltney's "violations are chronicled in the Discharge Monitoring Reports that the permit required petitioner to maintain").

violating the Act. In good faith reliance on that investigation, WaterKeepers sent AIM and the relevant government agencies its 60-day notice on June 28, 2000. (A copy of this notice is attached hereto as Appendix B. *See* App. 8a.)

In response to the notice, AIM filed its notice of intent ("NOI") seeking coverage under the General Permit on July 7, 2000, and about a month later prepared its first ever SWPPP and storm water monitoring plan. WaterKeepers carefully reviewed this SWPPP and, based on its extensive experience in assessing the adequacy of such documents, concluded that the SWPPP was inadequate. Accordingly, on September 12, 2000, WaterKeepers filed its complaint, alleging the same categories of violations as it had detailed in its notice.

III. In Dismissing WaterKeepers' Complaint for Lack of Subject Matter Jurisdiction, the District Court Expressly Declined to Consider Any of WaterKeepers' Evidence that AIM was in Continuous Violation of the Act.

Because an adequate notice letter is a mandatory prerequisite to the maintenance of a citizen enforcement action, challenges to such notice letters are often brought at the commencement of the litigation as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b). AIM never brought such a motion. Instead, after 18 months of intensive discovery, AIM raised the adequacy of portions of the notice almost as an afterthought in its opposition to WaterKeepers' summary judgment motion. AIM dedicated roughly three pages in its 44-page brief to arguing that the notice was insufficient with respect to just one of WaterKeepers' five causes of action. SER 95-97.

Roughly six months later, the district court took the parties' cross-motions for summary judgment, as well as their extensive evidentiary objections, under submission without oral argument and dismissed WaterKeepers' entire complaint for lack of subject matter jurisdiction. "Because the case is consequently disposed of on jurisdictional grounds," the court held, it "need not address the remaining allegations made by Defendants in their motion, or the merits of Plaintiff[s'] motion for summary judgment/summary adjudication of issues." Pet. App. 34a. As the Ninth Circuit observed, the district court based its dismissal "solely on the basis of WaterKeepers' allegation regarding storm-water discharges," Pet. App. 9a, and thus never addressed the adequacy of WaterKeepers' notice with respect to its other four causes of action.

Following entry of judgment, AIM filed a motion for attorneys' fees, contending that WaterKeepers' complaint was "frivolous" and not brought in "good faith." The district court denied AIM's motion. App. 1a. "The fact that this Court found Plaintiffs' pre-suit notice to be inadequate," the Court held, "does not mean that the underlying suit was itself frivolous. Indeed, because this Court ruled only on the adequacy of such notice and did not reach the merits of Plaintiffs' claims, AIM cannot realistically contend that the Court found the action 'groundless' as opposed to procedurally defective." App. 4a.

REASONS FOR DENYING THE PETITION

AIM does not even attempt to identify any provision of Supreme Court Rule 10 that would warrant review by this Court. Instead, it claims that "review is warranted to avoid unnecessary exhaustion of judicial resources and encourage voluntary compliance with the Act." Pet. 12. What AIM fails to acknowledge, however, is that this Court in *Gwaltney* definitively resolved the main issues presented.

As for AIM's asserted concern about avoiding unnecessary litigation, the holding that AIM attacks is not the opinion below, but the Ninth Circuit's four-year old decision in *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000) ("*Southwest Marine II*"), *cert. denied*, 533 U.S. 902 (2001). Pet. 12-14. There is even less reason for this Court to grant certiorari to review *Southwest Marine II* today than when it declined to do so three years ago. (Whether through inadvertence or otherwise, AIM fails to disclose this Court's denial of certiorari in any of its numerous citations to *Southwest Marine II*). Indeed, as AIM acknowledges, no court in any circuit has disagreed with that holding in the intervening years. Pet. 20. Moreover, contrary to AIM's vague assertion that *Southwest Marine II* somehow rendered the CWA's notice requirements toothless, the courts within the Ninth Circuit—including two Ninth Circuit panels applying *Southwest Marine II*—have continued to dismiss Clean Water Act claims where the notice letter failed to comply with the statutory requirements.[2]

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2. *See, e.g., ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143 (9th Cir. 2002) ("We conclude that the ONRC's 60-day citizen suit notice was not sufficient to alert a reasonable defendant to the two Clean Water Act claims dismissed by the district court"); (Cont'd)

I. This Court Should Deny Review Because It Already Rejected AIM's Main Contentions in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*

In its first question presented, AIM suggests that a CWA defendant can defeat subject matter jurisdiction and standing by asserting that it has come into partial compliance between receipt of a 60-day notice letter and the filing of the plaintiff's complaint. This Court's *Gwaltney* decision squarely forecloses any such argument.

Gwaltney concerned an industrial defendant that, like AIM here, was indisputably in violation of the Act at the time the notice letter was sent. 484 U.S. at 53-55. Unlike AIM, however, Gwaltney also submitted demonstrative evidence in support of its contention that it had *fully complied* with the Act prior to the filing of the complaint. *Id.* at 55 ("Gwaltney contended that [] its last recorded violation occurred several weeks before respondents filed their complaint").

On certiorari, this Court first held that the CWA does not confer jurisdiction over citizen suits for "wholly past

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(Cont'd)
Friends of Frederick Seig Grove # 94 v. Sonoma County Water Agency, 124 F.Supp.2d 1161, 1169 (N.D. Cal. 2000) (granting defendants' motion to dismiss as to CWA violations for which "plaintiff's notice does not provide the defendants with enough information to identify the dates of those unreported violations"); *see id.* at 1168 (adopting standard set forth in *NRDC v. Southwest Marine, Inc.*, 945 F.Supp. 1330, 1333 (S.D. Cal. 1996) ("*Southwest Marine I*"), *aff'd Southwest Marine II*, 236 F.3d 985). And, of course, the Ninth Circuit in the instant case dismissed the claim for which it found that WaterKeepers gave inadequate notice. Pet. App. 14a n.6.

violations." *Id.* at 64; *see also id.* at 60 ("[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into *complete* compliance with the Act and thus likewise render unnecessary a citizen suit") (emphasis added). The Court then addressed the impact on jurisdiction of a factual dispute as to whether a defendant had come into complete compliance with the Act prior to the complaint:

> Petitioner argues that citizen-plaintiffs must prove their allegations of ongoing noncompliance before jurisdiction attaches under § 505. [citation] We cannot agree. The statute does not require that a defendant "be in violation" of the Act at the commencement of the suit; rather, the statute requires that a defendant be "*alleged* to be in violation." Petitioner's construction of the Act reads the word 'alleged' out of § 505.

Id. at 64 (emphasis in original). In other words, this Court explained, CWA section "505 confers jurisdiction over citizen suits when the citizen-plaintiffs make a good faith allegation of continuous or intermittent violation" that is ongoing at the time of the complaint. *Id.*

WaterKeepers readily satisfies this test. First, it is undisputed that WaterKeepers alleged numerous CWA violations that were continuous and ongoing at the time of the complaint.[3] Pet. App. 16a & n.7; Complaint ¶¶ 45-51,

3. To be sure, AIM does assert that WaterKeepers' allegations were not made in "good faith." On that basis, AIM suggests that Supreme Court review at this juncture—rather than a Rule 11 motion before the district court—is necessary to determine whether WaterKeepers' allegations were in fact well grounded. As this Court (Cont'd)

59, 63, 68, 72. Second, while AIM refers to steps it assertedly took to "initiate[] compliance," it has never even attempted to document that it was in *full* compliance with the Act at the time the Complaint was filed.

Third, and perhaps most importantly, WaterKeepers has submitted extensive evidence, *never reviewed by the district court*, documenting both that its allegations were in good faith and that AIM continued to violate the Act for at least 18 months after the complaint. The Ninth Circuit properly remanded the case so that this evidence may be considered. Pet. App. 18a. By contrast, in *Gwaltney*, the stated purpose of the remand was solely to determine whether plaintiffs *allegations* of ongoing violations were made in good faith. *Gwaltney*, 484 U.S. at 64-65, 67; *see id.* at 55 (following summary judgment and a trial, the district court had not found any violations by Gwaltney that post-dated the complaint).

(Cont'd)
expressly held in *Gwaltney*, however, "Rule 11 of the Federal Rules of Civil Procedure, which requires pleadings to be based on good-faith belief . . . *adequately protects* defendants from frivolous allegations." 484 U.S. at 65 (emphasis added). AIM never sought relief below pursuant Rule 11. To the contrary, while AIM's counsel did threaten to move for Rule 11 sanctions based on a threatened motion to dismiss, it decided not to bring either such motion after WaterKeepers' trial counsel pointed out that doing so could subject AIM itself to sanctions. *See* SER 129.

II. The Ninth Circuit Properly Recognized That a Defendant Could Deprive the Court of the Power to Hear a Case by Coming into Complete Compliance During the 60-Day Notice Period.

AIM faults WaterKeepers for purportedly arguing that "it is irrelevant to the issue of subject matter jurisdiction and standing what steps AIM had taken to get into compliance with the Act before the respondents filed their Complaint." Pet. 8; *see also id.* at 16-20 (arguing that this is the necessary import of the *Southwest Marine II* ruling followed by the Ninth Circuit in this case).[4]

In reality, WaterKeepers argues no such thing. To the contrary, WaterKeepers freely acknowledges that a CWA plaintiff would have no standing where a defendant has indisputably come into complete compliance, and

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4. AIM also vaguely asserts that the opinion below somehow conflicts with this Court's holding in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). Pet. 10, 18-19. In *Steel Co.*, this Court held that an environmental group had no standing to pursue claims against a company under the Emergency Planning and Community Right-to-Know Act, where that company demonstrated that it had cured *all* of the alleged reporting violations by the time of the complaint. *Id.* at 105-06 (explaining that the plaintiff therefore failed to satisfy the redressability prong of Article III standing). The Court emphasized, however, that its holding does not apply where, as here, a plaintiff alleges continuing violations. *Id.* at 108 ("If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm"); *see also Friends of the Earth v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 188 (2000) (holding that a citizen alleging ongoing CWA violations satisfies redressability prong of standing); Pet. App. 16a n.7 (noting that "WaterKeepers' complaint alleges continuing and recurring violations of the Act").

eliminated any reasonable likelihood of the alleged violations recurring, prior to the filing of the complaint. Because a plaintiff in that situation also could not allege in good faith that the defendant was committing ongoing violations, there would be no subject matter jurisdiction. *See Gwaltney*, 484 U.S. at 56-63.

Likewise, the Ninth Circuit below expressly recognized, and applied, *Gwaltney's* holding "that citizen plaintiffs may not sue to remedy 'wholly past' violations of the [CWA, because] the Act confers jurisdiction only over suits that allege continuous or intermittent violations." Pet. App. 16a (citing *Gwaltney*). However, the Ninth Circuit also correctly noted that such a situation is not present in this case. *Id.* Rather, the question here is whether AIM's subsequent efforts to come into partial compliance somehow rendered WaterKeepers' notice letter defective, thereby requiring WaterKeepers to send a new notice letter—and wait another 60 days—before it could file suit. Observing that it would have been literally impossible for WaterKeepers to refer to AIM's subsequent compliance efforts at the time it served its 60-day notice, the Ninth Circuit unsurprisingly "h[e]ld that WaterKeepers was not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [AIM's] post-notice compliance efforts." *Id.* at 15a.

Contrary to AIM's unsupported assertion, the Ninth Circuit's holding does not remotely implicate the time-tested principle that subject matter jurisdiction "depends on the state of things at the time of the action brought." Pet. 16-17. The cases cited by AIM for this point simply confirm that subject matter jurisdiction, once established, "cannot be ousted by subsequent [i.e., post-complaint] events." *Mullan*

v. Torrance, 22 U.S. 537, 539 (1824) (diversity jurisdiction not divested by a party's post-complaint change in residence). Here, "at the time of the action brought," WaterKeepers had submitted a notice letter that complied with all statutory and regulatory requirements. As both a factual and a legal matter, AIM's later changes to its plans could not possibly affect whether these conditions precedent had been satisfied. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (construing analogous notice provisions of the Resource Conservation and Recovery Act as "mandatory conditions precedent to commencing suit").

III. There Is No Conflict Among the Circuit Courts, and the Ninth Circuit Correctly Applied the CWA's Notice Requirements in This Case.

As AIM concedes, there is no conflict among the courts regarding the issues presented in this case. Pet. 20. For that reason alone, this Court should deny review. Moreover, the Ninth Circuit properly stated and applied the CWA's notice requirements here. The statutory requirements themselves are brief and straightforward:

> No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
>
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . .

33 U.S.C. § 1365(b). The EPA regulations promulgated to implement the CWA are likewise straightforward, providing, in relevant part, that "[n]otice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include *sufficient information to permit the recipient* to identify the specific standard, limitation, or order alleged to have been violated . . . [and] the date or dates of such violation . . . ." 40 C.F.R. § 135.3(a) (emphasis added).

The Ninth Circuit correctly quoted this provision, properly observed that the CWA's notice requirements must be "strictly construed," and then proceeded to determine whether all statutory and regulatory requirements had been met. Pet. App. 6a-11a. In determining how specific notice must be to satisfy 40 C.F.R. § 135.3's mandate that it "include sufficient information to permit the recipient to identify the" alleged violations, the Ninth Circuit followed the Second and Seventh Circuits, as well as its own prior precedents, explaining that "[n]otice is sufficient if it is reasonably specific and if it gives 'the accused company the opportunity to correct the problem.'" Pet. App. 7a (quoting *San Francisco BayKeeper v. Tosco Corp.*, 309 F.3d 1153, 1158 (9th Cir. 2002), *cert. dismissed*, 539 U.S. 924 (2003), and *Atlantic States Legal Found. Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997)); *see also Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 488 (2d Cir. 2001) (same).

Here, there is no doubt that WaterKeepers' notice was specific enough to inform AIM what it was doing wrong. Indeed, AIM acknowledges that the notice prompted it to attempt to correct the violations detailed in the notice. Pet. 5 & n.1; *see also Atlantic States*, 116 F.3d at 820 (defendant's attempted corrective actions in response to

notice letter shows that notice provided sufficient information to permit the recipient to identify the problem); *Southwest Marine II*, 236 F.3d at 997 (same). Moreover, the Ninth Circuit carefully considered, and rejected, each of AIM's rambling arguments as to why the notice letter's pages of detailed information about the alleged violations were somehow insufficiently specific. Pet. App. 11a-17a; *see* App. 13a-23a.

AIM also faults the Ninth Circuit for purportedly adopting in *Southwest Marine II* a "rule that whenever the alleged violation is continuous and ongoing the dates of violation either need not be stated or are presumptively known to the defendant." Pet. 15. The Ninth Circuit has neither adopted nor applied such a rule. And the notice letter in this case identifies the precise dates of AIM's alleged violations.

Specifically, with respect to stormwater discharges, the notice letter states that "you have discharged storm water containing pollutants . . . on each and every date which Attachment A indicates the rainfall at the Facility exceeded 0.1 inch . . ."[5] App. 14a-15a. The referenced attachment lists more than 300 such dates. *Id.* at 27a-29a. This listing of the specific dates of alleged violations, by definition, satisfies the regulatory requirement to provide "sufficient information to permit the recipient to identify . . . the date or dates of

5. The genesis of the 0.1 inch standard used in this and other notice letters is EPA's Industrial Storm Water Permit Final Rule. *See* 55 Fed. Reg. 47990-01, 48018 (Nov. 16, 1990) ("The definition of a 0.1 inch minimum was determined by [studies] to be the minimum rainfall depth capable of producing the rainfall/runoff characteristics necessary to generate a sufficient volume of runoff for meaningful sample analysis.").

such [alleged] violations." *See* 40 C.F.R. § 135.3(a). AIM's criticism of the asserted lack of proof to support these allegations improperly conflates the showing required to prevail on the merits with the allegations necessary to provide adequate notice. Pet. App. 10a, 16a-17a; *see Gwaltney*, 484 U.S. at 64-65.

Similarly, with respect to AIM's alleged failure to prepare and implement an adequate SWPPP, failure to comply with the General Permit's monitoring and reporting requirements, failure to implement best available technology, and failure to file a valid NOI to obtain coverage under the General Permit,[6] the notice alleged the precise dates of the alleged violations, namely: each and every day since the General Permit became effective in 1992. App.18a ("[Y]ou have been in daily and continuous violation of the requirement to develop and implement an adequate SWPPP for the facility on each and every day since October 1, 1992 and will continue to be in violation every day that you fail to develop and implement an adequate SWPPP."); *id.* at 19a-22a (same remaining alleged violations). As the lower courts have uniformly held, the failure to obtain a required permit or implement an adequate SWPPP is a daily ongoing violation; specifying the period of time during which this daily violation occurs thus satisfies the CWA's requirement to identify the dates of the alleged violation. *See, e.g., Southwest Marine I*, 945 F. Supp. at 1333 ("[T]he deficiencies in these plans are ongoing, so there is no specific date that can be alleged as the date of the violation. As long as Southwest operates

6. After filing the complaint, WaterKeepers learned through discovery that the NOI AIM filed during the notice period was in fact valid. Accordingly, WaterKeepers did not pursue this claimed violation below.

without a legally adequate BMP, SWPPP, or monitoring and reporting plan, the violations will continue each and every day."); *Southwest Marine II*, 236 F.3d at 996 (same); *American Canoe Ass'n Inc. v. District of Columbia Water and Sewer Authority*, 306 F.Supp.2d 30, 35-36 (D.D.C. 2004) ("Reference to ongoing violations is sufficiently specific notice.") (citing *Southwest Marine II*); *City of New York v. Anglebrook Ltd P'ship*, 891 F.Supp. 900, 906 (S.D. N.Y. 1995) ("[N]otice of a flawed SWPPP is notice of an ongoing violation").

CONCLUSION

For the reasons stated above, the Court should deny AIM's petition for certiorari.

Respectfully submitted,

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